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THE RATIONALE OF AGENCY

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"The characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of the principal,"¹ and Justice Holmes' thesis is that the rules of agency are the product of the fiction of identity and of common sense. Whether or not this is historically sound,² if we believe with Justice Holmes that "there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning,"³ we are left in a very unfortunate position, denied by our belief the ability to rationalize the subject and relying only upon intuition to determine when and to what extent common sense is to be applied. We are condemned to give lip-service to reason in a jargon of wise laws descending from the high priests of the legal cult.

But I believe that Justice Holmes overestimates the effect of the fictions. On the contrary I believe that the results reached by the courts can be explained without using legal presumptions as axioms and that individual cases may be tested by the use of judicial sense (rather than common sense) and the needs of commerce. On the whole the interests concerned have been well protected and this with but little interference from the legislatures which are prone to tinker with laws involving commercial matters. This result could not have been achieved unless the judges had decided in harmony with the general principles underlying our jurisprudence and in response to commercial necessity.

It is difficult, however, especially for students not inured to the use of fictions, which are used to conceal both thought and the lack of thought, to find the rhyme and reason of the law beneath the tangle of words which has grown upon the fertile soil of a three party relationship. It is the purpose of this article to restate in non-fictitious terms the essential elements of this relationship and to remove the epithet "anomalous" from some of the results where, it is alleged, the courts have blindly adhered to obsolete methods of thought. Specifically, I shall attempt to reduce agency to its lowest terms, and to consider its elements so far as they affect the parties, the acts, the powers of the agent, termination, and ratification.

¹ Holmes, *The Common Law* (1881) 232. His views are given at length in (1891) 4 HARV. L. REV. 345; and (1891) 5 *ibid.*, 1, reprinted in 3 *Select Essays Anglo-American Legal History* (1909) 368.

² Wigmore, 3 *Select Essays Anglo-American Legal History* (1909) 474, 533.

³ Holmes, *op. cit.*, 232. Of course Justice Holmes does not state that these ancient rules are the sole explanation of the modern law. But he does indicate that in many places the law is unreasonable and illogical because of them.

THE RELATIONSHIP

Turning to the current definitions of agency, we find them descriptive rather than analytical⁴ and cast in such form as to perpetuate difficulties without explaining them. A discussion of their salient points will open the way to what seems to be more helpful phrasing.

"Representation" is a prominent feature in most of them. This is in itself a fiction. Representation is "standing in place of another" and a representative is "one who stands in place of another." Of course no one can do this. But A may do acts which affect P by bringing to him legal consequences equal in kind and extent to those which would have resulted had P acted. "Representative" is an expression different only in form from "*alter ego*" and other phrasing connoting the identity of principal and agent. It is the modern "*qui facit per alium, facit per se*."

The agent agrees to sell (or to give) time, fidelity, skill, and obedience to the principal. In return he receives, in addition to any pay that he may contract for, indemnity and exoneration.⁵ These are, in general, the ordinary rights and duties of fiduciaries, and, as it is admitted that an agent is a fiduciary, it would seem better to call him one rather than a representative, which is rather a synonym of agent than an explanation.

Authority. This word is combined usually with the idea of representation and with delegation. It cannot be discarded since its long continued use has made it an essential part of our legal vocabulary. Unfortunately, however, it is used indiscriminately in two very different senses, e. g.: the power held by the agent, and the power coupled with the privilege of exercising it. Thus we have the qualifying and confusing words "real" and "apparent" added to it to explain that the principal may be bound by an act in excess of the agent's real authority if the act was within the scope of his apparent

⁴ For definitions see 1 Mechem, *Agency* (2d ed. 1914) sec. 26, note 2; 2 C. J. 419-428. Typical definitions of the better sort are: "The relation of principal and agent, or the relation of agency in the narrower sense (excluding master and servant) . . . is the legal relation which exists where one person, called the agent, is authorized—usually by the act of the parties, but occasionally perhaps by operation of law,—to represent and act for another, called the principal, in the contractual dealings of the latter with third persons." 1 Mechem, *op. cit.*, sec. 26. "'An agent' is a person who has authority, express or implied, to act on behalf of another person (the 'principal'), and to bind that other person by his acts and defaults." 1 Jenks, *Digest of English Civil Law* (1905) sec. 121. As there will be many references to Mechem's *Agency*, I take occasion to say that it is one of the best of modern law books on any subject; it has been cited by courts so frequently that upon no portion of the subject can its statements be neglected.

⁵ The modern workmen's compensation acts are a tardy recognition of this principle as applied to master and servant. The aberration of the courts in creating the fellow servant rule has been one of their most unfortunate errors and the one requiring most legislation to correct.

authority. This double use leads to inaccuracy and is unnecessary.⁶ Authority is from *auctoritas* meaning legal power, or power exercised in conformity to law. The confusion is due to using a word conveying a combination of elementary ideas, where one idea is to be expressed and where both are.

Using the single-idea word "power" to describe that which the agent holds, we escape confusion, and reserve "authority" for its proper and more limited use. "Power" has a definite meaning in law and its use is not limited to agency. It may be classified and analyzed.⁷ It is therefore both more exact and more helpful in connecting what are said to be the special rules of agency with the general body of the law. For present purposes, it may be said that a power is a legal ability by which a person may create, change, or extinguish legal relations.⁸

"Authority" should be limited to its primitive meaning of a power which can be rightfully exercised, or a power which can be exercised without going beyond the privilege given to A by P. Thus the phrase given above would be paraphrased: a principal is bound where the agent acts in the exercise of his power, although without authority, i. e., although not privileged by his principal to exercise it. The existence and extent of the power is determined by public policy; authority is limited by the expression of the principal's will in accordance with the agreement with or direction to the agent. The agent always has both a power and an authority, the latter being sometimes identical with, sometimes smaller, but never larger, than the former.⁹

⁶ See Cook, "*Agency by Estoppel*" (1905) 5 COL. L. REV. 36, 44.

⁷ See Hohfeld, *Some Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 16; Corbin, *Legal Analysis and Terminology* (1919) 29 YALE LAW JOURNAL, 163.

⁸ "A 'power' is an individual personal capacity of the donee of the power to do something. . . . It is no more his 'property' than the power to write a book or to sing a song." Fry, L. J., in *Ex parte Gilchrist* (1886) 17 Q. B. D. 521, 531. Professor Hohfeld in the article above cited cautions against calling a power a capacity, a word which must be reserved for other uses. It is probably true also that some holders of powers may be said to have something approximating "property," although the power of an agent is not property. We may distinguish the following characteristics of a power which have some bearing upon our subject: a power is personal to the holder, at least where not created for his benefit; it is not a right and may be exercised where such exercise is wrongful; it may be held without the knowledge of the holder and there may or may not be an obligation to exercise it; it is created by law, in some instances because of and in accordance with the will of the one whose property or legal relationships are affected by its exercise, and in other instances irrespective of his will.

⁹ Gray, in (1911) 25 HARV. L. REV. 1, says, in speaking of a "common-law power," that it is "an authority to deal with the property aside from ownership." In cases where authority and power are necessarily equivalent there is no harm in using them interchangeably. It may be objected that it does not add much to our stock of knowledge to say that a power is an ability or an

Acts for and in the name of. "For" is either meaningless or misleading when used alone, as it does not distinguish between those cases where a non-agent accomplishes results at the request of another or where one not requested acts in order to benefit another. The phrase as a whole is inaccurate, as it omits consideration of the body of law upon undisclosed and unnamed principals, which is an integral part of the subject and cannot be disregarded. The chief use of the phrase has been in connection with ratification, where it has been used wrongly, and in cases dealing with the termination of the relationship, where it has created unfortunate results. It should be retained only where its use can do no harm; it has no place in a definition.

*Founded on contract, or A contract of employment.*¹⁰ The word "contract" is used in many senses. If it means "an agreement which creates or is intended to create a legal obligation between the parties to it";¹¹ or if we adopt the cautious phrasing of Mechem:

"A contractual relation [is] one which, under normal conditions, results from the contract or agreement of the parties to it, which may ordinarily be terminated at their pleasure, and whose rights and obligations, as between the parties to it, are in general capable of being enlarged, diminished or modified by the contract or agreement of the parties";¹²

authority of a certain sort, since all the words in the definition require defining in turn. This difficulty seems inherent in definitions. Professor Corbin in his article on *Legal Analysis and Terminology*, *supra*, has gone around this difficulty in stating that a power is "the legal relation of A to B when B's own voluntary act will cause new legal relations either between B and A, or between B and a third person."

It is stated, sometimes explicitly (1 Tiffany, *Real Property* (1st ed. 1903) sec. 273) and often implicitly that the power held by agents is different from that held by non-agents. Because of this it is stated, that in the common-law powers under a will, the effective act is the creation of the power, while in agency the effective act is the execution of the power by the agent, which is feigned to be the act of the principal. This is a double-barreled fiction. The effective act in both cases is, first the grant of power, and secondly the execution of it. In agency the creator of the power is usually, probably always, alive when it is executed and an agent is a fiduciary subject to control; but this should affect neither the quality of the power nor the act of its execution. See Hohfeld, *Fundamental Legal Conceptions* (1917) 26 YALE LAW JOURNAL, 710, 726. That the two powers have arisen from different conceptions and developed along different lines cannot be denied, however, and this has led to important differences in legal results.

¹⁰ "Agency is founded on contract, express or implied." 2 Kent, *Commentaries*, *612; Wharton, *Agency and Agents* (1876) sec. 1.

¹¹ Jenks, *op. cit.*, sec. 182.

¹² 1 Mechem, *op. cit.*, sec. 33. See for more satisfactory treatment, 1 Williston, *Contracts* (1920) sec. 1; Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169. As applied to agency see, Anson, *Contract* (3d Am. ed. by Corbin, 1919) secs. 437, 446, 469; Williston, *op. cit.*, sec. 274.

there can be no great harm in calling agency a contractual relationship. It certainly is much better to say that it involves a contract than to call it a status. But there are objections to including "contract" in its definition. This word connotes an agreement between parties *sui juris* and based upon consideration or formality. Agency is not of this type. It is rather the result of a grant of power by the principal and the assumption of a fiduciary obligation by the agent. It is analogous to a trust rather than to a contract and the mutual obligations are created by the fiduciary character of the relationship, although there may be a contract varying or adding to these.¹³ If we must use a term importing agreement, "consensual" would be more expressive of the real situation.

That the relationship is consensual there can be no doubt. The law creates the power upon the voluntary act of the principal and he is the *dominus* during its existence. The agent's duty of obedience flows directly from the control which the cases recognize to be at all times in the principal. This control over the existence of the power implies the exercise of the will at the inception of the relationship, and, as the principal may create the power, so he may diminish, enlarge, or terminate it at will, subject, of course, to rules for the protection of third persons. On the other side, the duties of a fiduciary cannot be thrust upon an unwilling person, so that the relation cannot be created, nor can it continue to exist without the consent of both parties.¹⁴

Agency created by law. It is said sometimes that an agent may be appointed without consent of the principal. If the statements in the last section are correct, this is a contradiction in terms. In fact, however, all cases where it is said there is agency created by law are easily disposed of without invoking the relationship of agency. Thus the deserted married woman buying necessities is, of course, creating a

¹³ A gratuitous agent does not give his services in exchange for the receipt of the power. The latter is simply a prerequisite for the relationship in the same way that possession is a requisite to a gratuitous bailment, or title to a gratuitous trusteeship. These cases should be controlled by the same rules, and the liability of a gratuitous agent should be assimilated to that of a gratuitous trustee rather than to that of a promissor who has received no consideration for his promise. The cases have shown but a partial adoption of this view in that they require that the agent should have entered upon performance before subjecting him to liability. See *Criswell v. Riley* (1892) 5 Ind. App. 496, 32 N. E. 814; *Whiting v. Dyer* (1899) 21 R. I. 278, 43 Atl. 181; Beale, *Gratuitous Undertakings* (1891) 5 HARV. L. REV. 222.

¹⁴ Duties in regard to property which are similar to those imposed upon fiduciaries may be created where there has been a wrongful intermeddling. Thus we have constructive trustees and executors *de son tort*. These are properly tort feors against whom courts of equity or of probate give relief. A trustee who has accepted the title and the trust cannot withdraw at will. An agent, however, if he has only a power and not a title, cannot be compelled to exercise the power although he may be committing a breach of agreement in not doing so.

quasi-contractual obligation against her husband. An unpaid vendor, mortgagee, or lien holder is not a fiduciary, but is holding a power to protect his own rights.¹⁵ He is no more an agent of the owner than is a sheriff selling at an execution sale or the assignee of a chose in action.¹⁶ So in the case of statutes designating, for instance, the secretary of state to receive service for all foreign corporations doing business in the state. The question in these cases is never one of agency, but whether there has been consent to the jurisdiction and whether the method was a rational one for making service. So in the case of statutes giving husbands both a power and a duty to manage the separate estates of their wives. The husband is more a guardian than an agent and the ordinary incidents of agency should not attach, since there is not that control which lies at the basis of the principal's liability.¹⁷ Huffcut creates a class of "agents by necessity," combining some of those just mentioned with those where it is said that there is a special enlargement of powers created by an emergency.¹⁸ The two types of cases so mingled should be kept separate, unless in the latter case the powers are created directly by law and not in accordance with the will of the principal, such will being presumed in fact. Thus where a station agent employs a physician to attend an injured employee there is a (presumed in fact) real agency if it is found that the duties of such agents include calling physicians in such cases, unless the employer directs otherwise. If, however, the railroad is held liable irrespective of its orders to its agents, there is a quasi-contractual obligation and no act of agency.

To . . . represent in contractual relations with third persons. Shall the class commonly known as servants be included? Is a servant a species of the *genus* agent or is there a distinct relationship in the case of master and servant with special rules of its own. Agency has been used to cover the broad field including master and servant and

¹⁵ Scott, *Cases on Trusts* (1919) 88, note.

¹⁶ Kenneson in saying that an assignee of a chose in action is always an agent disregarded every element in agency save that of a power. See Kenneson, *Purchaser for Value Without Notice* (1914) 23 YALE LAW JOURNAL, 193. Of course an assignee may be also an agent; he is not, however, unless he has fiduciary obligations. A sheriff, on the other hand, has fiduciary obligations, but is subject to no control in the exercise of his power by the owner of the land he is selling, nor is the power derived from him. Of course it is a matter of definition. It is possible to make the term "agency" so broad as to include every situation where A has a power to affect the rights, privileges, immunities, etc., of B by pledging B's credit or selling B's goods. To exclude from a common-law definition of agency the idea of action for the benefit of the one represented would appear, however, to extend the scope of the term far beyond its accepted meaning.

¹⁷ Thus where there is compulsory service, there is no liability for the torts of the one so employed. *The Halley* (1868) L. R. 2 P. C. 193, Lorenzen, *Cases on the Conflict of Laws* (1909) 474.

¹⁸ Huffcut, *Agency* (2d ed. 1901) ch. 5.

principal and agent, as the terms are used in the digests and encyclopaedias, as well as the narrower field excluding master and servant. The double use of the word should be avoided and the profession should be grateful to one who can coin a phrase which will distinguish the two uses. If a servant is not an agent, such phrase should describe both relationships; if a servant is a special kind of an agent, the phrase should designate the non-servant agents.

The most serious attempt to prove that servants are not agents has been made by Huffcut who classifies servants as doers of "operative acts not intended to induce third persons to change their legal relations"; while "an agent makes offers, representations, or promises for his principal, addressed to third persons, upon the strength of which such third persons change their relations with another."¹⁹ This distinction is put forward as being necessary in order to explain the differing reasons for the liability of an employer where one employed does a forceful act causing injury to third persons and where he makes a misrepresentation or disobediently enters into a contract. That there may be different reasons of public policy in the two cases is clear; but it does not follow that a master is liable upon one ground and a principal upon another.

If this distinction is accepted, we immediately embark upon troubled waters. A porter in a train²⁰ is employed, *inter alia*, to represent to passengers that they have reached their destinations; a waiter, to make contracts with diners; a shop girl to sell. These have powers identical with those of the non-servant agent. It may be said that in selling or representing they are agents, and in serving they are servants. But even if we are not confused by this kinetoscopic effect,²¹ we have not material for the solution of cases. We know as a matter of law that one is liable for the torts of servants not involving representation, when the acts were done "in the scope of employment" and that for similar acts of those not servants one is not liable. We know also that some who have powers to make contracts, i. e. business representatives, may cause their employers to be liable for such torts. The waiter, mentioned above, would cause his employer to respond in damages, if while fulfilling a contract to place soup before a guest, he spills it upon the guest. The waiter is as much a salesman as a factor or a broker, whether he sells the soup or only a privilege to eat it. But a factor or broker would not make his principal liable for

¹⁹ *Ibid.*, II.

²⁰ He is classified by Mechem as a servant. 1 Mechem, *op. cit.*, sec. 37.

²¹ The misconceptions which may result are seen in Archer, *Law of Agency* (1915) sec. 3, where the author says that a grocery boy taking orders and negligently injuring a third person would cause his employer to be liable as a principal, while if he did the same act in the afternoon while delivering orders, the employer would be liable as a master. Of course there is a master and servant relationship in both cases.

the negligent injury of a customer or third person while in the act of delivering the goods. If Huffcut's test is retained, we shall have to have a further test to determine when one who is employed to make contracts and perform acts in connection with them is a servant. There are servants who perform only acts not involving the making of contracts; but there are also other servants who are employed primarily to make contracts. Both are fiduciaries, both are subject to control by the principal and both have powers to subject the principal to liability.

The real distinction between servants and non-servant agents is stated clearly in *Singer Manufacturing Company v. Rahn*, where a traveling salesman of sewing machines carelessly injured the plaintiff. The court, in finding him to be a servant, says:

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished. . . . Corbett . . . agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it."²²

This distinction is one, and I believe the only one, which will solve the cases.

A servant, then, is an agent under more complete control than is a non-servant. The difference is in the degree of control rather than in the acts performed. The servant sells primarily his services measured by time; the agent his ability to produce results. As in all cases involving questions of degree there are difficult cases, but in none of these, save in the case of statutory interpretation, with which at present we are not concerned, is it conclusive that manual acts are to be performed. It is because of the more complete control over the servant, resulting from the sale of his time to the employer, that the latter is liable for results for which one employing an agent not a servant is not liable. The servant may or may not have a power to subject his employer to liability upon contracts; in all cases, however, he does have a power to subject him to liability for acts done in the employment. This justifies a classification of servants, but it does not justify excluding the class of servants from the larger one of agents. In other words, a servant is an agent having power to subject his principal to liability for torts not involving representation, as well as such other powers as the principal may have given him. The relationship is created by a grant of control over the servant's time.

On the other hand we must not assume that in fact a servant must exercise less discretion than an agent. The perfect butler never has to be directed, while the novice at horse trading may require the most

²² (1889) 132 U. S. 518, 523, 10 Sup. Ct. 175.

minute instructions as to methods of procedure. Cases based upon this distinction are more or less disjointed in reasoning although the results are usually correct, the court being protected by its judicial instincts.²³

A similar distinction is used sometimes to classify messengers, it being said that one who is given no discretion cannot be an agent.²⁴ The *nuntius* is said to be a mere mouthpiece, carrying forward in a mechanical way the volition of the one sending. This is, however, a mere figure of speech. The *nuntius* having an individual will can exercise it and does exercise it when he delivers or fails to deliver the message. His action follows directly from his own volition; the will of the sender is simply one of the facts upon which he bases his action. If his words cause his employer to be a party to a contract, it is because the latter gave him a power of so doing. This power may be very limited²⁵ and, if we like, we may call an agent whose duty it is to deliver a message, a *nuntius*, but nothing turns upon the distinction.

Agency or trust. The two relations are often spoken of as necessarily distinct.²⁶ They have, however, two similar elements. A trustee is a fiduciary and has a power to affect the legal relations of the *cestui*. It is true that he holds this power because he holds a "title," but by virtue of this he may deprive the *cestui* of his interest in the property or create in him rights against third persons, as where he sells the property to one with notice. It is true that the trustee always holds a title and usually is not subject to the control of the *cestui*, while an agent is always subject to control and usually has no title.

²³ Thus in *Kingan & Co. v. Silvers* (1895) 13 Ind. App. 80, 37 N. E. 413, often cited for this distinction, an agent was empowered to receive a note from the debtor and take it to the principal. The agent mutilated the note while it was in his possession. The court instead of holding that the only power held by the agent was to receive and deliver the note, found it necessary to find that, in the delivery to the principal, the one who formerly was an agent became a servant. Undoubtedly, however, if the one carrying the note has injured negligently a third person, the court would not have subjected the employer to a tort liability, unless it found also other elements of the master and servant relationship.

²⁴ Hunter, *Roman Law* (4th ed.) 622; Wharton, *op. cit.*, sec. 15. Wharton's inclusion of "discretion," i. e., rightful choice of means, as an element in agency leads him to distinguish a servant as one who, on the whole, has no discretion. His distinctions between servants and agents, obviously adapted from the Roman law, are wholly unsound. See Wharton, *op. cit.*, sec. 29.

²⁵ The cases dealing with the liability of a sender of a telegram, where the wording is changed in transit, should depend upon a determination of the limit of power. One employing a translator is subjected to liability according to the terms as translated to the other party. *Holland China Trading Co. v. Tong Tai Firm* (1905) 2 Hong Kong, 54.

²⁶ See Mechem, *op. cit.*, sec. 42; Huffcut, *op. cit.*, sec. 3. The fact that the rights and privileges of the *cestui* were originally protected only in equity is not important for the present comparison.

Where, however, an agent acquires a title or a trustee submits, by agreement, to control by the *cestui*, there is a double relationship of agent-trustee created. The point is worth notice only because of the attempts to evade responsibility by the transfer of title to another, or the taking of title in the name of another. Where this is done and no control is reserved, the ordinary liability of the trustee and the non-liability of the *cestui* results.²⁷ Where, however, there is disclosed an intent that the equitable owner is to be the *dominus* of the situation and the other is to respond to his orders in regard to management, there is an agency and the normal liability of a principal is created.²⁸

The definition. Assembling the factors which appear to be necessary in the agency relation, we have power, fiduciary, and control. Stringing these together, I suggest something in the nature of the following: Agency is a consensual relationship in which one (the agent) holds in trust for and subject to the control²⁹ of another (the principal) a power to affect certain legal relations of that other. In this statement "in trust for" is used in place of "for the benefit of." "Control" includes the idea of consent by the principal and is in itself one of the distinguishing features, recognized in all the cases as one of the foremost reasons for liability, but not finding its way into the definitions. "Power to affect certain legal relations" may be objected to as too broad. It is not wholly satisfactory but is the only phrase occurring to me which covers all the cases, e. g. power to make contracts, to grant and receive titles, to make statements and admissions, to create obligations against and confer rights upon the principal by the doing of acts or the receipt of knowledge or notice. It may be objected that the power held by a servant to cause his master to respond in damages for a negligent act is a result of the relationship rather than an element of it. So also, I believe, may be the power of an agent to subject his principal to a contractual duty when acting contrary to instructions. These are secondary powers created by law irrespective of the intent of the parties and depend upon the primary powers created by law in accordance with the expressed intent of the parties.

This definition purports to be nothing more than a rearrangement of the elements which are universally recognized as essential. Its

²⁷ See Street, *Trusteeship and Agency* (1892) 8 LAW QUART. REV. 220.

²⁸ Scott (1915) 28 HARV. L. REV. 725, 737. A bank receiving a note for collection is said to be an agent, but is, of course, also a trustee if it is an indorsee.

²⁹ This is offered merely as a suggestion for practical use. The word "control" may be analytically improper as not falling within recognized categories. It is used here to indicate the legal coercion capable of being exercised by the principal through his power of revoking, diminishing, or enlarging the powers granted the agent, the agent being under the correlative legal liability of having this power exercised; which distinguishes the relation of agency from that of trustee and *cestui* and of contractors.

only value is that it delimits the subject with a reasonable degree of certainty and may be used to advantage in the analysis of situations. The topics discussed below have been selected as illustrations of the use to which the definition may be put. They do not cover the whole field but are those in which the language commonly used seems to need clarifying or upon which there has been more or less controversy.

THE AGENT

In discussing capacity to be an agent, we find statements of text writers³⁰ and dicta of courts, correct in their application to the facts discussed, but misleading when taken from their context. Thus where it was said "that there is no condition however degraded, which deprives one of the right to act as a private agent," the court was dealing with a case involving the power of a slave to subject his master to liability.³¹ That the common law gives to every natural person a capacity (rather than a right) to hold a power is beyond question.³² There is no reason to believe that an insane person, if capable of performing a legal act, can not bind one willing to entrust him with a power. The only requirement for capacity seemingly at the common law is ability to act.³³ But these statements have reference only to the existence of the power. Unless the power holder is also a fiduciary there is no agency. To call a slave an agent seems clearly erroneous and to say that he is a quasi-agent is not much of a help to clear thinking. To say that he is an agent between the principal and third party, although as to the principal he is not an agent, is an inexact method of stating that he is the holder of a power with such fiduciary rights and obligations as one with his personal status can have.

Conversely, when it is said that, as between principal and agent, the latter cannot be an agent when disqualified by adverse interests, confusion of thought is apt to result.³⁴ One may hold a power as the

³⁰ 1 Mechem, *op. cit.*, sec. 176, 177; Huffcut, *op. cit.*, sec. 23; Story, *Agency* (8th ed. 1874) sec. 7.

³¹ *Chastain v. Bowman* (1833, S. C.) 1 Hill, 270.

³² This seems to be assumed as axiomatic. Of course it is not, and other systems of law as the Roman law, have at various times in their development given capacity only to certain classes of persons. A corporation, being purely a product of law, has capacity to act as agent only where this is inferred from the charter.

³³ Where there is anything less than this, there is but a mechanical agency. Unless there is an intervening actor, it is incorrect to speak of that which makes the last physical movement as holding a power. Thus the movements of a mesmerized person in response to the directions of another is the act of the latter.

³⁴ Story says without limitation that one with an adverse interest is disqualified from becoming an agent. Story, *op. cit.*, sec. 9. Practically all of the commentators use similar language, but qualified as stated above.

fiduciary of another, although he has adverse interests. He ought not to do so without a disclosure of the facts, it is true, and if he does so he cannot recover for his services and is liable for any losses. But the exercise of the power will create a contract between the principal and a third person. It is because the power holder is an agent that he is personally liable for the failure to reveal the facts. And a third party who knew the facts is liable to the principal, not because the agency did not exist, but because it did exist. He was fraudulent in assisting a fiduciary in defrauding the employer.

THE ACTS

Just as there must be legal capacity to be an agent so there must be capacity to create a power. One who cannot make a contract can not authorize another to make it for him. The converse of this is, however, not necessarily true,—that one who can make a contract or do an act has capacity to create a power in another to make the contract or do the act.³⁵ The power exists only where the law gives capacity for its creation. It is, however, the general policy of the common law to allow relationships to be created through the exercise of powers as fully as if created directly. When this is not allowed, it is because of some particular policy which prevents. Thus the position of the few jurisdictions which hold that an infant cannot appoint an agent may be supported upon the ground that it is sound policy to prevent the infant from entering into business transactions save those which he can conduct personally. There are, of course, many other cases where public policy requires personal action. To ascertain whether or not an act falls within this group, it is usually necessary only to consider whether the purpose of the law will be as well served if the act is done by an agent.

In some of these cases where personal action is required, it is said that the law is satisfied if the act is done in the presence of the one whose act it purports to be, though not done by him personally. In these cases it is said that the actual doer is not an agent, but an automaton—a tool actuated by the will of the principal.³⁶ Again

³⁵ Beale states that agency is a fact created solely by the will of the parties and not by law. 3 Beale, *Cases on the Conflict of Laws* (1902) 542. We must assume that he means by this only that the law will operate to create agency in those cases alone where there has been the will by the parties to create it. Of course a legal power can exist only by virtue of the law. I may direct another to speak words, which if spoken by me would cause me to become a contractor. But unless the law operates upon the situation, creating a legal power in the one directed, I will not become a party to the contract.

³⁶ 1 Mechem, *op. cit.*, sec. 208. Story says, "the act of signing and sealing is to be deemed his personal act, as much as if he held the pen." Story, *op. cit.*, sec. 51. Even as a general statement of the legal effect, this is not universally true. *Lord v. Hall* (1849) 8 C. B. 627; *McClure v. Redman* (1919, Pa.) 107 Atl. 25.

the result is sound but the reason given is but a figure of speech. The "automaton" is in fact a free agent, responsible to the criminal law for his crimes and to the civil law for his trespasses. It is his mind which controls his act, although this in turn is controlled by the will of another. To say that he is an automaton is only to avoid giving a reason for a desirable result, i. e. that because there are illiterates and cripples in the world, convenience and practical necessity demand that the requirement of personal action be satisfied by a signature made in this manner under close supervision.

"The agency must be for a lawful purpose."³⁷ This statement, frequently made, has reference only to the contract between the principal and the agent and is misleading, as are many of the statements of the courts when dealing with cases where one or more of the parties contemplated an illegal result. For this reason, it may be worth while to state the results of the decisions in terms of the present analysis.

Where the principal and agent combine to produce a result known by both to be illegal:

(a) If the result is criminal, there is no fiduciary relationship between them. There can be no partnership of highwaymen. If the result is illegal only to the extent that a contract to perform it would be void, a fiduciary obligation may arise upon the completion of the act. Thus where betting agreements are non-enforceable, though not criminal, an agent who has collected the proceeds of a bet for his principal must account.

(b) The power to subject the principal to liability exists. Thus where an effort is made to corner the market or to sell smuggled goods, it is not correct to say that "the appointment is void." An innocent third party is not affected by the illegality; a knowing third party is prevented from recovering because of his own wrong doing. An employment to steal or kill is not void; one may be hanged for the act of an employee.

Where neither agent or principal is innocent, a fiduciary relationship exists, although the duties are all in one of the parties, as also the power. Thus if I employ innocent agents to corner the market, I will be a party to any contract made by them for me and will also be subject to the ordinary obligations of a principal towards an agent.³⁸ So, contrawise, if I innocently employ an unlicensed broker, the only effect of his lack of license will be to prevent him from recovering commissions.

³⁷ Reinhard, *Agency* (1902) sec. 65. Similar expressions are used by all the commentators. See especially Story, *op. cit.*, sec. 9.

³⁸ A Missouri statute causing an innocent agent to stand *in pari delicto* with a guilty principal is an acknowledged departure from common-law principles. See *Elmore-Schultz Grain Co. v. Stonebraker* (1919, Mo. App.) 214 S. W. 216.

THE POWER

In the following discussion will be included cases of agency and also cases which resemble it only in externals, i. e. those situations where the law, operating upon the voluntary act of P, creates in A a power to affect the legal relations of P, this being created in order to prevent injustice. It will not include tort cases, being limited to those powers the exercise of which results in some form of contractual liability. These may be divided into two classes:

(a) *Powers, the exercise of which results in true contracts.* In this class is included all cases where the parties to be held, i. e. both principal and third party, intended or expressed an intention to create the specific agreement or an agreement of the sort made. Cases where the existence of the principal was unknown to the third party are excluded since the parties are as much a part of an agreement as the terms. Also excluded are certain cases where the agent exceeded his orders. For convenience, a further subdivision may be made:

(1) The powers originated by direct grant to the agent create what is usually called "real authority," so called, I presume, because the agent is privileged to exercise them in the performance of his fiduciary obligations. They are again subclassified into those created by "express authority" and those created by "implied authority," the latter referring to powers created by the conduct of the principal in connection with the usages and customs of the business of the locality.

That the existence of these powers is no departure from the operation of the ordinary principles relating to contracts is clear in most cases. If the principal has agreed to become a party to a particular contract and the agent obeys orders, there is an expressed consent conveyed as intended to the other party. Where the agent is given discretion as to the creation or terms of such contracts, there is a variation from the usual offer and acceptance situation where there is not the intervention of an agent. It is not true here that the contract is completed by the will of the principal alone, or that the agent is "a referee who settles the price," a mere "tetotum."³⁰ The contract

³⁰ "Suppose that the principal agrees to buy a horse at a price to be fixed by another. The principal makes the contract, not the referee who settles the price. . . . If the messenger is himself the referee, the case is still the same. But that is the case of an agent with discretionary powers, no matter how large they may be." Holmes (1891) 4 HARV. L. REV. 345, 347. "For in all cases alike, the contract is completed by my will and the agent is merely the medium through which my will is completed." Savigny, *Conflict of Laws* (Edin. ed.) sec. 373. "Let us never forget that our law of agency does not say that the agent makes a contract and that by some process of transfer the rights and duties thus created are transferred to the principal; but that, on the other hand, it does regard the contract as made by the principal through the agent, the agent being treated only as a medium of communication." Cook

comes into existence through the independent will of the agent, for the latter is responsible for his acts and words so far as his status as an individual permits. But the contract does come into existence in accordance with the expressed will of the principal and there is no departure from the theory of contracts. Nor is there anything peculiar in "implied authority," which corresponds to contracts implied in fact. Actions have the same weight in expressing intentions as do words, and in neither agency nor contracts do we inquire what a party thinks; we interpret his words and acts. The power, therefore, includes all that the agent reasonably believes it contains and this is determined by custom, if there are no instructions to the contrary.

Where the existence, but not the name, of the principal is known, it might be thought that a true contract is not created. But in this case, T, the third person, by his agreement with A, the agent, shows his intention to contract with a person indicated by description and of course it is not necessary to know personally the other party to a contract. It is sufficient if he falls within the class intended to be dealt with. It may be objected that the agent is a party to the contract and that there is but one contract. It is true that in many cases the agent has been a successful plaintiff and an unsuccessful defendant. But those cases may be placed upon a number of different grounds,—the form of the written agreement,⁴⁰ a custom to hold the agent as guarantor,⁴¹ a right in the agent to sue created by his personal interest in the goods.⁴² In all of these cases there may be alternative or secondary agreements with the agent but these do not affect the existence of the intent to deal with the principal nor the reality of a consensual relationship with him. Of course if the third party chooses to deal exclusively with the agent, we have no question of agency, at least within the principles now discussed.

(2) The power created where the principal has led T to believe that a power existed in A. This refers, of course, to "ostensible authority" or the so-called "agency by estoppel." In this class of cases also, there is created a true contract. As has been pointed out,⁴³ we may discard the use of the word estoppel as unnecessary, although doubtless the basis for liability is much the same as in estoppel. If P represents to T that A has authority to contract, the legal result is exactly the same as if A had authority to contract. Here A has a power to create contractual relations between P and T identical to

(1906) 6 COL. L. REV. 36, 40. Of course this is true, *fictitiously* speaking. Interpreting "the law regards," we have: the agent and the principal both give consent, but the legal effect is that the principal alone is a party to the transaction with the third party after the exercise of the power by the agent.

⁴⁰ *Short v. Spackman* (1831) 2 B. & Ald. 962.

⁴¹ *Pike v. Ongley* (1887) 18 Q. B. D. 708.

⁴² See Wharton, *op. cit.*, sec. 502; Williston, *op. cit.*, sec. 285.

⁴³ (1905) 5 COL. L. REV. 36.

those which would have been created by the same words spoken to A. It is objected that if A is not an agent, a misrepresentation that he is one will not make him one and, since, by hypothesis, there is no true agency, the obligation must rest upon estoppel.⁴⁴ This is not, however, an accurate statement of the representation. In the statement by P that A is his agent, the only part material to T is that A has a power to create certain ascertainable contractual relations between P and T. This representation may be made, of course, by any action which indicates to a normal person that A has the particular power in question. This is indicated by conduct leading T to believe that A is a certain kind of an agent and that he has power to deal with the class of persons to which T belongs.

The situation is not different from that where P makes an offer personally to T. P's actual consent is unnecessary. The offer is made by the speaking of the words or the doing of an act with communication through authorized channels. With P's mental processes we are not concerned. In the case of agency the courts have used the language of estoppel, very largely because of the double use of the word "authority," a use which has led to phrasing indicating that the power is real only where it can be rightly exercised. That the contract is real, however, has never been questioned and therefore the power to make it must be real.⁴⁵ If in these cases A purports to exercise the power, he has as against P, the rights and duties of an agent only where P's representations are such that A reasonably believed that P intended him to act as agent in the matter. But the existence of agency is not essential to the reality of the powers or of the contracts made by their exercise.⁴⁶

⁴⁴ *Ibid.*, 354.

⁴⁵ The danger of having these cases rested upon the ground of estoppel may be appreciated by consideration of the confused results reached by the courts in cases of admitted estoppel. See Ewart, *Estoppel* (1900) 218. Assuming that a "purchaser by estoppel" acquires at most an equitable title to the property, one who purchases through an agent by estoppel would likewise acquire only an equitable right, nor would the principal be a party to a contract. It is in the interest of common sense to limit as far as possible the round-about language of estoppel and its results reached from adhering to language used in connection with estoppel of an entirely different sort. That one should be bound to make good his statements (though not his promises, perhaps) is clear, and it is no less clear that where the owner of property represents another to be the owner and stands by as it is sold to him, only the artificial rules of estoppel prevent the legal title from passing, at least in the case of personal property. It would be unfortunate if similar results were to be reached in the case of "ostensible agency."

⁴⁶ In (1905) 18 HARV. L. REV. 400, the writer of a note, in commenting upon the article in (1905) 5 COL. L. REV. 36, says that it is introducing a new fiction to say that "legal agency is created whenever" P "leads another to believe that" A is his agent. This is correct, but Professor Cook might have replied that he did not say that legal agency was created. There is no agency created,

Entirely irrespective of this excursus upon estoppel, however, there are in these cases all the essentials of contracts and there is no divergence from general principles. But two points call for further notice.

The representation that another is an agent of a particular kind or has authority to do certain classes of acts, sweeps into the power conferred all acts that the customs and usages of the trade or locality have made usual. But, as Ewart points out,⁴⁷ there would be no real contract created by such acts if T were not aware of the custom, since there would be no communication of P's holding out or offer, it being assumed that A is not authorized to make the representations as to the extent of his powers. Thus where there is a holding out to T that A is a particular kind of an agent and by the custom of the place such agents have authority to warrant, there is no holding out to T that A has this authority unless T knows of the custom. In this, the situation differs from that where there is a direct grant of authority to A to warrant, for in this case A is authorized to state that he has such power.

The representation may be made in a great variety of ways, and so also the communication. T may receive his information individually or as one of a class. The communication may be by advertisements, by an office being kept open with signs indicating its character, or it may be through A himself. That "the authority of the agent cannot be proved by the agent's statement of it," is true; but there may be a power based upon statements which the principal has authorized the agent to make. If he so authorizes a statement, the fact that at the same time he instructs the agent not to exercise the power does not affect the rights of third persons who do not know of the instructions. This is the basis of the cases where an agent disobeys instructions and there are no elements of misrepresentation except in the agent's statements. Thus if P tells A to represent to buyers that he is P's horse selling agent and instructs him not to warrant, as is the custom, but also not to disclose this want of authority, A creates in himself a power to warrant by following the instructions. This is true whether A is a "general" or a "special" agent, since the power is created not by the agreement between P and A as to A's authority, but by the authorized statement of A that he is a horse selling agent.

but there is a power created. This is merely a statement of the legal result, and avoids the indirectness of Professor Cook's statement that apparent authority is real authority to the one to whom the representations were made. The "apparent authority" creates real power to deal with the particular person or class of persons to whom the authority is apparent. The German Civil Code uses this method of statement: "A power of agency is conferred by declaration to the person who is to exercise the power, or to the third party with whom the business delegated is to be transacted." German Civil Code, sec. 167.

⁴⁷ (1903) 16 HARV. L. REV. 186.

These "secret instructions" must be distinguished from the instructions considered later.

In much the same way where a principal intrusts goods to a selling agent, it is inferable as a fact that he causes the agent to represent that he has authority to sell the goods in the normal manner with the usual incidents of sale in the locality to which they are sent. Merely giving possession of goods to another is not a representation of ownership, even, perhaps, when they are sent to a place where such goods are commonly sold;⁴⁸ but to intrust goods or the *indicia* of title to one for the purpose of sale or as security for a loan may be said to be equivalent to a representation that the agent has the usual power of sale.⁴⁹ If this is such a representation, as most courts have considered it, the result is the same whether the goods were given to a "special" or to a "general" agent.

In all of these cases classified as containing powers resulting in true contracts, we find that either the act of the agent was rightful, i. e. he had authority, or there was a manifestation of assent given by the principal through some authorized channel to the third party. There can be no contract made by "holding out to the world" an agent as having a particular character or particular powers.⁵⁰ In the absence of authority or representation, there is nothing to which the principal has expressed assent to the third person, and hence nothing to which the general rules of contract can be applied. This does not prevent, however, obligations arising the remedy for which lies in an action of assumpsit.

⁴⁸ *Levi v. Booth* (1881) 58 Md. 305; *Biggs v. Evans* (1894) 1 Q. B. 88.

⁴⁹ See Ewart, *op. cit.*, ch. 26. I have some doubt as to whether there is any representation of authority made in these cases or the creation of appearances by him, upon which the third person reasonably relies. There is, however, knowledge on the part of the principal that the agent's statements of authority will be materially assisted by the presence of the goods, and this may be sufficient to place the burden of loss upon him in the case of a dishonest or disobedient agent, although where there is no possession of goods, the principal does not bear the burden of loss in the case of a disobedient special agent.

⁵⁰ Mechem says that the authority of the agent "is an attribute of the character bestowed upon him by the principal" and that, having bestowed that character upon him, the principal is subjected to liability for acts within the general character, except as to third persons who know of it. 1 Mechem, *op. cit.*, secs. 709-710. This character would seem to be that which the third person has been led to believe the agent has. It does not seem clear from Mechem's statement whether or not he intends to include any states of fact not coming within the situations discussed above. However, he states that the situation of the undisclosed principal is anomalous, thereby seeming to indicate that, except where illogical results are reached, the principal is bound only by the privileged acts of the agent or where he has made a representation of authority to the third person. 1 Mechem, *op. cit.*, sec. 711. Under the German Civil Code a power may be created by a holding out to the world, as well as to a particular third party. Sec. 171. But by the same system of law, an offer may be made to the world and there may be acceptance in such cases without a knowledge of the offer. Sec. 657.

(b) In the second class of cases I have placed *powers, the exercise of which does not result in a contract, but which does create obligations enforceable in an action of assumpsit*. For further consideration, they may be divided into two groups: (1) where the existence of the principal is unknown and the agent acts in conformity to orders, and (2) where the agent acts contrary to orders and there is no element of representation of his authority by the principal to the third person. These are distinctive agency powers, existing only where all the elements of agency exist and seemingly created by the relationship. That they do exist cannot be denied in view of the cases, and their existence prevents, if nothing else does, the conception that the agent is a sort of human machine conveying the assent of the principal to the third person. For in the case where the existence of the principal is undisclosed, the third person did not assent to the principal as a party to the contract, and in the second group of cases the principal never assented nor expressed assent to the contract as made. It is for this reason that it cannot be said that the resulting obligation is a true contract, there being no mutual assent, even by the use of the most violent presumptions.

In group (1) where the existence of the principal is unknown, the resulting obligations are accepted by the commentators as something like an excrescence. It may be that historically it can be explained only through the fiction of the identity of master and servant,⁵¹ or as the outcome of

"a kind of common law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations."⁵²

Pollock says frankly that "the position of an undisclosed principal is an anomaly."⁵³ Ames goes further. He charges the doctrine with the two sins of ignoring fundamental principles and of producing injustice.⁵⁴ Of course if it ignores fundamental principles, we must expect that it will produce injustice, if we have faith in our principles. But I think that the doctrine is not as black or as peculiar as it is painted and that the case against it is somewhat overstated.

⁵¹ Holmes (1891) 5 HARV. L. REV. 1. In a note in (1920) 33 HARV. L. REV. 591, the writer, adopting to the fullest extent the fiction of the identity of principal and agent, finds the difficulty, not in causing the principal to be a party, but in allowing the agent to be one. His argument seems to be that a principal and agent are one, and as the principal is that one, the agent can be liable only upon some theory of tort or estoppel. This view neglects entirely the expressed assent of the parties and sacrifices a clear principle of contracts to preserve a useless fiction. See 1 Williston, *op. cit.*, sec. 284.

⁵² Huffcut, *op. cit.*, sec. 120.

⁵³ (1887) 3 LAW QUART. REV. 358.

⁵⁴ Ames, *Undisclosed Principal—His Rights and Liabilities* (1909) 18 YALE LAW JOURNAL, 443.

Of course it is a fiction, though not because of that an anomaly at common law, to designate as a contract that which is obviously not consensual. There is nothing necessarily inconsistent, however, in allowing an action of assumpsit either by or against the principal, based upon the agreement made by the agent. Accepting Lewis' theory as sound, that assumpsit lies against one who has caused the plaintiff to change his position for a stipulated reward,⁵⁵ the technical objection against allowing suit by the third person fails. And the common law was accustomed to enforce promises made to another than the plaintiff.⁵⁶ It created an obligation to pay when land was left upon a condition,⁵⁷ and later created out of whole cloth, by the fiction of an implied promise, all those obligations now known as quasi-contractual. In the case of the undisclosed principal, the only fiction alleged is that of treating the principal as a party to the contract, and this fiction is not needed either to create rights in favor of or obligations against the principal.

In fact the cases do not accept this fiction in reaching results. Thus if we say that the principal is a party to the contract on which suit is brought, the agent obviously is not. Yet he can sue. There is but one signature, yet the principal or the agent may be held at the election of the third person. If, however, we conceive that there is, running between the principal and the third person, an obligation created by law in the terms of the contract made by A with T and based upon the justice of the situation, we have no difficulty with the question of suit by the agent or with the single signature. As the obligation is created by law there is no need for a signature by the principal and there is no conflict with the parol evidence rule. The doctrine of election also becomes more intelligible. The right against the principal is created upon the definite abandonment of the claim against the agent upon the contract. In creating this obligation the courts of the eighteenth century were following judicial precedent and anticipating other "anomalies" which, like *Lawrence v. Fox*, have caused our law to keep within measurable distance of the necessities of civilization. If we ascribe the rise of the doctrine to a "sort of common-law equity," the result is no more abnormal than allowing "equitable defences" to sealed instruments.

Ames objects that logically the undisclosed principal is a *cestui que trust* and that a *cestui* cannot sue or be sued at law. Admitting that he is a *cestui*, he may, as such, realize through proceedings in equity upon the claim held by his trustee (agent) against the third party, as Ames pointed out. If the rights of the third person are properly taken care of, as in fact they are, the only abnormality is the infor-

⁵⁵ Lewis, *The Liability of an Undisclosed Principal* (1909) 9 COL. L. REV. 116.

⁵⁶ Where one receiving money, promises to pay another. *Key v. Gordon* (1701) 12 Mod. 521.

⁵⁷ Ames, *Cases on Trusts* (2d ed. 1893) 3, note 2.

mality of allowing a direct action at law. The same is true in the case of suit against the principal; there should be no objection simply on the ground that a short cut has been taken.

The only criticism of the doctrine that can have permanent value is that it produces unjust results. It is said that it is inequitable to allow the principal to sue the third person, or at least that it is inconsistent with the common-law idea of a personal relationship created by a contract. But before the modern doctrine of the undisclosed principal arose, this conception of a personal relationship in contracting parties had been destroyed by allowing contracts to be assigned. And the undisclosed principal stands in no better position than an assignee, or a *cestui* joining in equity the trustee and the obligor.⁵⁸ On the other hand, Ames objects that the cases produce injustice to the principal. A *cestui*, he says, cannot be made directly liable, but the trust property may be reached through the right of exoneration of the trustee. Since an agent has a right of exoneration against the principal personally, the latter should be reached in the same way, the extent of his liability to the third person being the amount owing from the agent to him. Thus if the principal has paid the agent, or if the agent had misconducted himself, or if, in the specific transaction, the agent had exceeded his authority, the principal should not be liable to the third person.

But Ames, after doing a great service in pointing out the analogy between the usual *cestui* and an undisclosed principal, did not point out the one great difference. The principal is a *cestui*, but he is also more. He is a master. A *cestui* receives profits; a principal receives profits and controls the manner of making them. It is for this reason that his duty to exonerate is both personal and unlimited. Liability follows control and it is not unjust, therefore, to allow the third person to recover against one who is both the receiver of the profits and the *dominus* of the one making the contract. Again, it is said that the third party receives a godsend neither contemplated nor bargained for, in being allowed to recover against the principal, and that this should be allowed only where, otherwise, the principal would be unjustly enriched. But the economic side of an essentially commercial subject can not be overlooked. Aside from any actual misrepresentation or estoppel, the principal enabled the agent to invite the confidence of the third person. It was his credit which gave the agent assurance

⁵⁸ The right of the principal to sue is the great difficulty which Justice Holmes finds in reconciling the doctrine with common-law principles. Yet the courts were following the precedent set in the action for money had and received. That the rule is of equitable origin is seen by the fact that the principal cannot sue where to allow suit would cause his credit to be substituted for that of the agent. *Birmingham Matinee Club v. McCarty* (1907) 152 Ala. 571, 44 So. 642. Or where the third person has an equitable defence against the agent. *King v. Batterson* (1880) 13 R. I. 117. And the third person may set off any debt arising against the agent before discovery of the existence of the principal.

to enter the transaction and his support which gave the agent a standing in the mercantile world. To trust the owner of a business is not the same thing as to trust one who is not such owner and who is subject to the control of another in the transaction. With or without fault, the action of the principal has led the third person into a mistake of fact as to the actual situation. The third person, in being given a claim against the principal, does not get, necessarily, more than he expected; he gets something different.

Ames also justly objects that the present rules do not allow suit between the principal and third party in the case of transactions involving sealed or negotiable instruments, and subscriptions for shares. This result is due to the timidity of the courts in pushing aside formal rules when dealing with matters essentially formal. There is no particular reason why these exceptions should continue to exist.⁵⁹ That they do exist, however, shows at least that the doctrine of undisclosed principal does not rest upon the fiction of identity, for were this true, the name of the servant would be the name of the master and action would be allowed.

In group (2) where the agent acts contrary to instructions and there is no element of representation by the principal to the third person, the courts have created a power in the agent in certain cases:

1. Where the agent is intrusted with the management of a business or with a series of transactions, he has the powers usual to an agent of his class, and limitations sought to be placed upon it are ineffective unless brought to the attention of the third person dealing with the agent.

(a) Where the existence of the principal is unknown. This result has been severely criticized, but has been accepted without hesitation by a great majority of the courts.⁶⁰

⁵⁹ Thus the doctrine of *Lawrence v. Fox* is extended in many jurisdictions to promises under seal. 1 Williston, *Cases on Contracts* (1903) 409, note 1. Whether the doctrine should be extended to negotiable instruments is purely a question of commercial policy. In *Donner v. Whitecotton* (1919, Mo. App.) 212 S. W. 378, (1919) 29 YALE LAW JOURNAL, 229, the court, refusing to allow an action against the undisclosed principal upon a covenant of warranty, allowed action against him for the value of what he had received as the result of the sale by the agent, on the theory of unjust enrichment where there had been partial failure of consideration.

⁶⁰ For criticisms of *Watteau v. Fenwick* (1893) 1 Q. B. D. 346, the leading case, see 2 Mechem, *op. cit.*, sec. 1767. The court was following the partnership cases which had held that a dormant partner was liable for the unauthorized acts of the known partners. As to that, Pollock says that a dormant partner is liable "because he is, by the partnership contract, liable to the same extent as the known partners." (1893) 9 LAW QUART. REV. 111. In fact, however, as a matter of contract, a dormant partner is liable only upon contracts rightfully made by the active partners. Liability beyond that is created by law in spite of the intention of the parties. The same remark applies to Ewart's statement that a partner, "although dormant is a member of the firm and when

(b) Where the existence of the principal is disclosed, the existence of this agency power has been denied, explicitly by many⁶¹ and implicitly by all who, admitting the soundness of the general rules of undisclosed principal, disagree with *Watteau v. Fenwick*. For if this case is correct, it must be because of a principle that an agent has a power, in certain cases, greater than his authority, although there has been no element of representation to the third person. That such a power does exist where the existence of the principal is disclosed as well as where it is not, is seen by an examination of the cases. As seen before, "a holding out to the world" is not a representation to the particular third person. Nor can there be a holding out to him that an agent has a power to contract in conformity to the customs of the trade or locality unless such third person knows of such customs. If, therefore, liability were placed upon grounds of representation, it should be a part of the case of a third person seeking to hold a principal where the agent had acted in accordance with the powers usually conferred upon such agents, but contrary to his individual orders, to show that he, the third person, knew of such holding out or knew of the customs. In fact the cases do not require this.⁶² It follows, therefore, that the power must be created by the relationship of principal and agent, and that the principal is not bound upon a theory that he assented or manifested any assent; he is bound because he is a principal.

This method of approach assists in solving the difficult question of what is meant by instructions. Where the power is based solely upon representations, the only instructions which do not affect third persons are those intended to be kept secret and those which are purely

a contract is made by an active partner, the dormant member is as much a party to it as if specifically named in it." See Ewart, *op. cit.*, 246. But if the third party did not know of his existence, he had no intent to contract with him. He intended to contract with the firm of A & B, not A, B, & C. So far as C was concerned there was no more real contract than there was with the brewer in *Watteau v. Fenwick*. And to say that there is "an appearance of real authority" is to find that C held out A and B as having authority to contract for C, something which obviously cannot be true as to one who did not know of C's existence.

⁶¹ Most of the commentators state that the principal is liable only where the agent was authorized (was privileged to act), or where there was a holding out to the third person. Holmes (1891) 5 HARV. L. REV. 1; 1 Mechem, *op. cit.*, sec. 709 ff.; 2 C. J. 566.

⁶² See Bigelow (1901) 13 GREEN BAG, 50; 2 Street, *Foundations of Legal Liability* (1906) 486; Steele, *Agency* (1909) sec. 91, note 37. The latter book, although intended only as a manual for students, contains some very careful work. The following cases, as well as those following *Watteau v. Fenwick* and those upon dormant partners, may be cited for this, among a large number of similar cases: *Butler v. Maples* (1870, U. S.) 9 Wall. 766; *Daylight Burner Co. v. Odlin* (1871) 51 N. H. 56; *Gaar Scott & Co. v. Rose* (1891) 3 Ind. App. 269, 29 N. E. 616; *London Savings Fund Society v. Hagerstown Savings Bank* (1860) 36 Pa. 498; *Bentley v. Doggett* (1881) 51 Wis. 224; *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97.

by way of advice. But, as pointed out by Mechem,⁶³ there are many instructions not intended to be kept secret which affect the third person only if he is informed of them. For example, there is no reason to suppose that ordinarily a principal intends that an agent not authorized to warrant should keep this limitation secret. Yet in the case of a general agent, the principal would be held liable were a warranty such as is customary in the business to be given. In dealing with the situations coming within the class considered here, the principal's intent as to this concealment by the agent becomes immaterial; the third person is unaffected by any instructions not in conformity with the customs of the locality or business, unless he knew or should have known of the instructions.

2. Where the agent is intrusted with the management of a particular transaction, and is given neither the possession of goods, nor documents indicating a more extended authority, I have discovered no cases where a principal has been held liable for unauthorized acts. In making this distinction, I am aware that modern text writers and some courts are inclined either to cast aside or minimize the effect of the classification into general and special agents.⁶⁴ But although the necessity for its application may be infrequent, the classification was made by the older judges and commentators⁶⁵ and it plays an important part in the development of the law. It cannot be said that it is difficult to contrast a general agent with a special agent. Justice Strong, in *Butler v. Mapes*, has summed up the judicial attitude:

"The purpose of [a special agency] is a single transaction, or a transaction with designated persons. . . . Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency."⁶⁶

⁶³ 1 Mechem, *op. cit.*, secs. 730 ff. In the discussion of instructions and particularly of *Watteau v. Fenwick*, Mechem indicates a belief in this class of powers.

⁶⁴ *Huffcut, op. cit.*, sec. 7; 1 Mechem, *op. cit.*, sec. 738 ff.; Wharton, *op. cit.*, sec. 125; Ewart, *op. cit.*, ch. 26.

⁶⁵ Story, *op. cit.*, sec. 17; 1 Parsons, *Contracts* (5th ed. 1866) 40. Athurst, J., in *Fenn v. Harrison* (1790) 3 T. R. 757; *Whitehead v. Tuckett* (1812) 15 East, 400; *Munn v. Commission Co.* (1818, N. Y.) 15 Johns. 44; *London Savings Fund Society v. Hagerstown Savings Bank*, *supra*.

⁶⁶ (1869, U. S.) 9 Wall. 766, 773-774. It is impossible to prove affirmatively that in no cases has a principal been held liable upon an unauthorized contract of a special agent, with the limitations as stated above. There may be such cases. But the courts have repeatedly used the distinction as a reason for not creating liability. For an example, see *Bell v. Offutt* (1874, Ky.) 10 Bush, 632. The distinction proposed by Holland between an agent whose powers are created by usage and those created by the special terms of the employment has not been accepted by the courts, nor does there appear to be any reason why such a distinction should be made. See Holland, *Jurisprudence* (9th ed.) 260.

There is considerable business sense in the classification, which in effect creates powers in proportion to the authority created in another and adopts a convenient rule of thumb for easy measurement. It must be borne in mind, of course, that a special agent may be given the most complete authority in dealing with the particular matter intrusted to him. If it is said in some cases that a special agent has "general powers," the meaning is that the agent has been given such authority in dealing in the particular transaction as a general agent normally has. It must be remembered also that there may be a representation by the principal that the agent has greater authority than that given him and that the power will be commensurate with the representation.⁶⁷ Furthermore the instructions given a special agent may be intended to be kept secret, or may be merely advice, intended not to limit the agent's powers but to guide his discretion. In these cases the instructions do not limit his powers.⁶⁸ Furthermore, the fact that the agent acted in bad faith and in fraud of the principal is immaterial, unless known to the third person, since the motive with which the act is done does not affect the exercise of the power.

Reasons for the creation of agency powers. Unless it is true that an agent's power may be greater than his authority in cases where there has been no representation of authority, there would be no necessity to discuss the reasons for the liability of the principal. Assuming that such powers have been created by law, there must be some reasons of public policy which require their existence. It must be in the protection of some conceived interest of business that, except in the case of a special agent, one is prevented from creating powers limited to the express authority given. The employer's interests are fully protected only if he is allowed to create powers of any kind and limited in any manner so long as he does not affirmatively mislead others.

In the first place it is to be noted that the conception that interests can be protected only in certain defined ways is not limited to the

⁶⁷ Pollock, J., in *Smith v. McGuire* (1858, Exch.) 3 H. & N. 554, stating that if one holds out another to the world as a general agent, the principal is bound though the agent exceeds his authority. "It is so even in the case of a special agent; as for instance if a man sends his servant to market to sell goods, or a horse for a certain price and the servant sells for less, the master is bound by it." In *Brady v. Todd* (1861) 9 C. B. (N. S.) 592, the court failed to find any element of representation in sending an agent to a fair for the purpose of selling a horse, and, as the agent was special, did not subject the principal to liability upon a warranty made in conformity to custom but contrary to orders. See note 49 *supra*.

⁶⁸ See *Towle v. Leavitt* (1851) 23 N. H. 360; *Hatch v. Taylor* (1840) 10 N. H. 538. The latter case, often cited as denying the distinction between a special and a general agent, is a well reasoned case in which the court brings out the fact that both kinds of agents may be granted powers not limited by instructions which were not to be communicated.

law of agency or to powers. Only certain interests in land will be protected by the creation of easements; the desire of the parties to create an easement is not enough.⁶⁹ So a statement of an intention to make an instrument negotiable will not make it such. A mortgagor cannot in advance cut off his equity of redemption. "The law will not permit the owner of an estate to grant it alternately to his heirs male and female."⁷⁰ For one reason or another the law prevents the creation of extraordinary types of dealing, because conceived to be injurious to the individual or to the public. It is, therefore, not inconsistent with the custom of judicial decision to create powers in accordance with general customs, if there are affirmative reasons for so doing.

In all the cases where an agent exceeds his authority, one of two persons, both innocent, must suffer. Between these two classes of persons, we must select the class which, in the long run, should suffer. The reasons which have actuated the courts in placing the burden upon the employer may be grouped under three heads.

Trust reposed in the agent. It is said that there is no reason for preferring the third person for he has trusted the agent. True, he does trust, but not equally with, nor in the same way as does the principal. In the case where the principal is undisclosed, T trusts the solvency of the agent; where the principal is known, he trusts his truthfulness. In both cases A and T are adversary parties. On the other hand the principal trusts the truthfulness, the honesty, the loyalty and the discretion of the agent, for that is what A has agreed to give him. When the agency relationship has been established A and P are not adversary parties; the agent is a fiduciary and subject to the stringent rules created upon the hypothesis that the fiduciary exists only to benefit the *cestui*. There is a trusting with a power, as in the case of a trustee there is a trusting with a title. It is true that there is no general principle that a known trustee may bind the trust estate where he acts in excess of the authority given him but, in the absence of notice of the existence of a written authorization, he may create rights in favor of third persons by such act.⁷¹

Control. Liability follows control and the principal has a power of control at all times. It is true that normally liability for unintended results comes only where there has been negligent conduct on the part of the one who is held. There are, however, extra-hazardous uses where liability for injurious results is absolute. And

⁶⁹ "But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such latitude be given." Lord Brougham in *Keppell v. Bailey* (1834) 2 M. & K. 517.

⁷⁰ Pollock, C. B. in *Hill v. Tupper* (1863) 2 H. & C. 121.

⁷¹ Scott, *op. cit.*, 733, note.

one of the elements of such liability is that the use shall be both dangerous and novel. It is not introducing an incongruity to subject the principal to liability where he has attempted to create an unusual power which may be expected to cause injury to third persons dealing with reference to the usual business methods.

Business convenience. Agency is essentially commercial; generally there is neither time nor opportunity to examine the extent of the powers of the individual agent by tracing them to their source. They have to be classified and taken at a face value. The general agent must circulate more or less as does a negotiable instrument without hindering conditions. Because of this, an agent sent out habitually with powers limited in certain abnormal ways would be in a position to cause injury to third persons. In sending out an agent, the principal knows, or should know, that his vouchers will not be carefully looked to. And he knows that the agent will not be apt to mention a lack of authority, for this might often interfere with sales. He knows of the human qualities which, at times, will lead even a faithful agent to overstep his authority in the desire to make sales. It is said that the third party need not deal with the agent. But if business is to continue, agents must be dealt with and protection given as experience rather than logic dictates.

In reaching this result, the courts have had before them the more or less imperfect analogy of the liability of a master for the torts of his servant. In both cases, the courts cannot avoid the conclusion that it is good business sense to hold that where one employs and controls another in the performance of acts for the benefit of a business, that business ought to pay for the mistakes, negligence and errors of judgment of the one so employed. For this purpose, the general agent may be said to bear the same relation to the special agent that a servant bears to an independent contractor.

THE PURPORTED EXERCISE OF A POWER

The liability of the "agent." Where one professing to act as agent has no power to act, it is now clear that he is not a party to the contract, since it was not agreed that he should be. It is equally clear that if he knowingly misrepresents that he has a power, and thereby induces the other to enter into a supposed contract with P, he is guilty of deceit. But his liability upon the ground that he has warranted the existence of a power to act, although now admitted as a matter of authority, has been generally disputed as a matter of principle. Thus Pollock says that the result is reached by a fiction similar to that which allowed assumpsit to be brought for money paid by mistake and to avoid the consequences of an inadequate remedy in torts.⁷²

⁷² Pollock, *Law of Torts* (9th ed. 1912) 555; see also Huffcut, *op. cit.*, sec. 163, where the author says that the agent "represents that the principal was

That, if the act of A is considered solely as a representation, the result is inconsistent with *Derry v. Peek*⁷³ there can be no doubt. If there is no contractual relationship between the agent and third person, we must be content to regard it as a beneficent innovation. In fact, however, the agent and the third person do actually agree, although their agreement, where the agent is acting within his powers, is concealed by the theory that the only agreement is with the principal. The agent is in reality a seller of the exercise of his power, if he has one. When the owner of property sells it, he exercises his power as owner to divest himself of the title, and, the other consenting, to create a new title in the purchaser. That he agrees that he has a power to create this new title is ordinarily inferable as a fact, in the case of personalty at least, because that is the way in which an agreement of sale is understood. Thus the warranty of title is created as a presumption of fact.

In the case of one purporting to act as agent, the same presumption should be made. In exchange for the undertaking of T to enter into a contract with P, A guarantees that he has a power to make P a party. If the agent is regarded merely as a channel of communication, or if the promise of the agent is the promise of the principal, no such agreement would exist and the agent could be held only upon a representation that the principal consents to the existence of the contract. The doctrine of *Collen v. Wright*, instead of being a judicial creation, invoked to cure the imperfection in the law of torts, is based upon the fundamental facts of the situation. It recognizes the real act done by the agent and disregards the fiction of the identity of principal and agent. Of course, if A "quit claims," i. e. refuses to warrant, or lays before T the evidences of his power, there is no inference of a warranty and the agent is not liable. And where A in fact does have the power, the unilateral agreement with the third party is completed and the agent drops out of the transaction, unless there has been additional terms in the contract with the agent.

Ratification. If for no other reason than to prevent unconscious confusion of thought, ratification should be taken from its customary position in the chapters dealing with the creation of agency. So far from being the creation of a power in an agent, ratification is the exercise of a power created in one not a principal by one not an agent,

competent to give such authority." This does not explain *Patterson v. Lippincott* (1885) 47 N. J. L. 457, 1 Atl. 506, a case of an infant principal. The agent appears to contract only that he holds a power from the principal. He neither warrants nor contracts anything else. It is stated that the doctrine is not only fictitious but also anomalous, since it gives the third party something for nothing. In the case of every broken contract which is purely executory, there is the same "something for nothing" obtained by the one given a cause of action for such breach. See (1906) 6 COL. L. REV. 42, note 2.

⁷³ (1889) 14 A. C. 337.

but who purports to be one.⁷⁴ It is difficult to assign a logical place to the doctrine and the fictions used in it are very extensive, but on the whole it conforms to our needs and to the general principles of law, although it is harshly spoken of.⁷⁵ All systems of law have had occasion to use it and nothing can exist permanently in law which is opposed to its fundamentals. There are three situations which need to be considered separately:

(a) *Where the third party does not know of the lack of power and does not learn of it until after ratification.* After the transaction with the purported agent, T believes he has a contract with P. Instead of this, he has a right of action against A. It cannot be said that he has made an offer to P, for an offer is an expression of willingness that a contract shall be made in the future (upon acceptance), while here there is consent only to a present contract. Nor will it do to say that T contemplates that A may not have a power to contract and therefore is giving, in the alternate, consent to a present contract or a future one when the supposed principal consents. It is untrue in fact and the cases do not support it. Were the theory followed, the contract would not "relate back" and T would have no right of action against A.⁷⁶ T agrees only to a present contract. When P ratifies, the contract is complete and A is released from liability. Before ratification, therefore, P has a power to create a contract in the terms of the agreement which T thought he was making, and to release A from liability. It is the existence of this power which is said to be anomalous.

The law everywhere seeks, or should seek, to satisfy the reasonable expectations of persons, at least so far as they have expressed them. The rules of that portion of the law which relates to contracts is a result of an effort, more or less sub-conscious, to cause those expectations to be realized. One is bound by his promises, for otherwise

⁷⁴Of course it is unimportant that the one acting is an agent for P in other matters; unless he has a power to create the particular contract involved, there is no agency for the purpose of ratification. The power held by the "principal" is created by the simulation of agency, so that on the one hand it is immaterial that A, though purporting to act for P, was acting on his own account and neither desired nor expected P to ratify. *In Re Tiedman and Ledermann Freres* [1899] 2 Q. B. 66. And on the other hand one purporting to act for himself but intending that the benefit of the transactions should go to another if ratified, does not create a power of ratification in that other. *Keighley, Maxstead & Co. v. Durant* [1901] A. C. 240.

⁷⁵Justice Holmes speaks of the "additional absurdities introduced by ratification." (1891) 5 HARV. L. REV. 1, 14. Mechem speaks of it as anomalous. 1 Mechem, *op. cit.*, sec. 343. Ewart says that it is destined to disappear because it rests upon a foolish fiction. Ewart, *Waiver Distributed* (1917) 129.

⁷⁶Tuttle suggests that the agent be treated as a speaking tube with T talking in one end and P talking in the other, the tube holding the consent of the third person in suspense. (1901) 35 AM. L. REV. 864. This is exchanging old fictions for new.

the promisee would be disappointed. The common law requires consideration, upon a theory, perhaps mistaken, that it is not reasonable normally in business matters (and the law seeks to protect only business interests here) to expect that a promise made as a gift will be fulfilled, unless, perhaps, it is made with solemnity. The same phrasing may be used as to the enjoyment of property or personal interests. The law, including equity, seeks to give to one what the civilization of the day deems he has a "right" to expect or, failing that, to give compensation taken from those who have deprived him of it.

This is exactly what the doctrine of ratification does. T gets what he expected, neither more nor less. He did not expect or desire a claim against A and he has no reason to be disappointed if it is taken away. He did expect and desire a contract with P and that is what he receives, including the date and place to which he assented. But, it is argued, P receives a godsend. In a changing market he has the choice of accepting or rejecting the contract. This does no harm, however, unless the third person is in some way injured. If the principal does not assent, he has not injured the third person; there is no ratification and no anomaly. The third person may sue the one who has caused the loss, viz., A. If he does ratify, the fact that he **was not bound** in the meantime cannot be of importance since it has not influenced T. The latter with his lack of knowledge is entitled to no sympathy. It is a human trait to shiver at perils which have passed us by in our sleep, but such were only potential and not actual injuries.⁷⁷

It will be insisted, however, that there is no logic in a theory which allows that which purports to be act *x* but is not to become act *x* upon the happening of a subsequent event. The answer is that the law does not say this. The ratification is the completion of the contract and the prior acts are all operative facts in the final result. The law does not cause a contract, ratified June first to be made May fifteenth. But in order to carry out the expectations of the parties, the act on June first creates the same legal effects, so far as it can be done without injuring third parties, as if the contract had been made on May fifteenth. And so as to the place of making. The law governing is probably that of the place where A and T agreed⁷⁸ which appears to be contrary to the rule that it is the law of the place where acceptance is given or where the final act is done that controls the validity of the contract. But this is simply an arbitrary rule created for convenience. In general the courts have held that the law to govern is that which the parties intended should govern if this has a

⁷⁷ If Damocles had sat through the banquet without being conscious of the sword, he would have had no common-law cause of action against Dionysius.

⁷⁸ *Hill v. Chase* (1886) 143 Mass. 129, 9 N. E. 30; *contra*, *Shuenfeldt v. Junkermann* (1884, C. C. N. D. Iowa, E. D.) 20 Fed. 357.

reasonable connection with the contract.⁷⁹ Obviously T would be getting something different from that which he expected to get if the law controlling were not as it would have been if the agent had possessed the power.

If this result of relation back is illogical or fictitious, it is at least the way in which the law normally operates in analogous situations. Thus there is a promise implied in fact in a contract to sell that the seller will be able to perform and that he will do nothing before the time of performance to prevent performance. If, however, although he originally had no title or after a disabling act, he puts himself in a position to perform and the promisee in the meantime has not acted, performance may be offered and the previous breach cured. It may be said that here there is a contract and that there is merely an election to consider the inability as a breach. True, but the subsequent act takes away the election and this whether the facts were or were not known to the party having the election.⁸⁰

We find the same doctrine of relation back in numberless cases involving property. Thus an adverse possessor acquires title not only to the slave which he has held for the statutory period but also to the children of such slave born less than the period back.⁸¹ So where a testamentary power is executed, there is a relation back for some purposes to the will.⁸² A more complete analogy is found in "estoppel by deed." If A receives a deed to Blackacre from B who has no title, he gets only a right of action. If B now acquires the title, A gets it and, at least in some jurisdictions,⁸³ loses his right of action. Furthermore the title relates back⁸⁴ and exists independently of any right to sue the grantor.⁸⁵ It is not based upon misrepresentation, but operates because "it is the manifest intent of the parties."⁸⁶ Applying these cases we may say that the agent gets in his power to contract as the seller got in his power to convey.

⁷⁹ *In re Missouri Steamship Co.* (1889) 42 Ch. Div. 321; *Prichard v. Norton* (1882) 106 U. S. 124, 1 Sup. Ct. 102; *Hotel Woodward Co. v. Ford Motor Co.* (1919, C. C. A. 2d) 258 Fed. 322, COMMENT (1920) 29 YALE LAW JOURNAL, 329, and *ibid.*, 362.

⁸⁰ See *Short v. Stone* (1846) 8 Q. B. 358; *Ziehen v. Smith* (1896) 148 N. Y. 558, 42 N. E. 1080; Ames, *Cases in Equity Jurisdiction* (1904) 427, note 1.

⁸¹ *Bryan v. Weems* (1856) 29 Ala. 423.

⁸² 4 Kent, *op. cit.*, *338.

⁸³ 3 Gray, *Cases on Property* (2d ed. 1906) 547, note. If the purchaser was injured by lack of title, as where he did not get possession, or could not make a sale because of such lack, the right of action should not be taken away. So, if he has begun action before the grantee acquires title, he should have his costs. In these cases, however, there is loss, which is not true of the cases in ratification now discussed. The exceptions to the doctrine, as that a notice to quit cannot be ratified, are conceived to prevent injustice to the third person.

⁸⁴ *Doe d. Christmas v. Oliver* (1829) 10 B. & C. 181.

⁸⁵ 3 Gray, *op. cit.*, 539, note.

⁸⁶ Redfield, J., in *Blake v. Tucker* (1840) 12 Vt. 39.

So in the cases based upon *Lawrence v. Fox*, the courts have created obligations in much the same way. Thus after A has promised B to pay C, there is generally no obligation from A to C until C has elected to receive it, for before that time A and B may revoke. It is C's election which causes A to be bound as upon a contract, a result which subjects A to a double liability and which cannot be explained upon a theory of equitable execution, since this latter remedy exists only in case of B's insolvency and the cases do not turn upon that.⁸⁷

There are many other situations where an act which purports to create an obligation does not in fact do so but is treated as a part of a whole transaction, which when completed is considered as having been effective from the time of the first act. Thus an oral contract within the statute of frauds, or a sale made by an executor subject to the approval of the court.⁸⁸ In all of these cases the courts attempt to carry out the intent of the parties as nearly as possible. There is no more fiction in the result than there is in selecting the mailing of the reply as the act which brings a contract into existence.

(b) *Where both A and T know that A has no power, there is neither ratification nor need for it.* A, not purporting to act as agent, does not do the act requisite as a basis for ratification. There is merely an offer with such terms as the offeror wishes to make. He may include as terms that the contract is to be considered as made in the place and of the date of the agreement with A. He may also provide that the offeree need not communicate acceptance in the usual way, but that an act sufficient for ratification will constitute acceptance, and that the offer is to remain open at least until the offeree has had an opportunity of accepting. There is no public policy against such an understanding with A, and where T knows that A has no authority to act, it may be assumed as a matter of fact that he makes that kind of an offer.

(c) *Where the third party wishes to withdraw before ratification.* If he knew of the lack of authority in A from the beginning there would be no unfairness in holding that the offer must be kept open until P has had an opportunity to accept, on the theory that A was

⁸⁷ 1 Williston, *Cases on Contracts* (1903) 410, note 2. In *Lawrence v. Fox*, *supra*, Johnson, C. J., based his opinion upon the doctrine of ratification, although there can be no ratification in the ordinary meaning of the term, since there was no purporting to act as agent for another. In allowing A and B to revoke before C has elected, the courts reach exactly the same result as do the English cases in ratification, in which it is held that the third party may withdraw by agreement and only by agreement with the purported agent after lack of authority has been discovered but before ratification.

⁸⁸ In *Bellows v. McGinnis* (1861) 17 Ind. 64, Worden, J., said: "*Where there are diverse acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation,*" so that the grantee was allowed to sue for an injury to the property committed before the date of approval by the court.

induced to act relying on the assumption that the offer would be kept open. This would lead us, however, into the non-existent land of promissory estoppel and would therefore be inconsistent with the main body of the law of contract.⁸⁹ Where T did not know of the lack of authority, both fairness and the analogies would allow him an option to withdraw. This is allowed both in the case where estoppel by deed might otherwise operate and in the cases of contracts for the purchase of land where the purchaser discovered the lack of title before the time for performance.⁹⁰ Most of the American courts have reached this result in the cases dealing with ratification.⁹¹ The English cases to the contrary must be wrong. To say that to allow the third person to withdraw before P has had a reasonable opportunity to ratify is to "deprive the doctrine of its retroactive effect" and cause it not to be "equipollent to a prior command"⁹² is to worship the fiction of relation back as a transcendental shrine and justifies the harshest language used by the critics of the doctrine. It creates an offer when none was intended and imposes upon a mistaken party an obligation not imposed upon an offeror. The English court creates before ratification a contract subject to disaffirmance, a one-sided obligation created elsewhere only where it has been paid for, where protection is afforded to a dependent class, or where there is fraud.

In the case of torts, the relation back operates in much the same way to give the parties about what they deserve to have. To take, for instance, the ratification of a libel. The injury in defamation is produced not by words uttered, but by the publication to hearers, and as an element of damage the standing of the speaker has weight. Anyone, therefore, who gives credit to a defamation is himself a defamer. In ratifying the words of one who purported to speak in his name, P in effect republishes the defamation and revives in the minds of the hearers the words as first uttered.⁹³ The total effect is the same as if

⁸⁹ The civil law theory of contracts being different in this respect does not allow revocation before ratification in this case. "Before ratification of the contract, the other party is entitled to revoke, unless he knew of the absence of authority at the time when the contract was entered into." German Civil Code, sec. 178.

⁹⁰ See *James v. Burchell* (1880) 82 N. Y. 108; *Forrer v. Nash* (1865, Eng. Ch.) 35 Beav. 167.

⁹¹ The results of the Wisconsin decisions, which require fresh assent on the part of the third person for the completion of the contract, would be correct were there no doctrine of ratification. Take from the doctrine the conception that the first transaction was a step in the contract and there is but a strange medley of unexplained results. The different views are clearly stated in Wambaugh, *A Problem as to Ratification* (1895) 9 HARV. L. REV. 40.

⁹² Lopes, J. in *Bolton Partners v. Lambert* (1888) 41 Ch. Div. 295.

⁹³ It is true that one publishing a copy of a libel is not in any way responsible for the results of the first publication. *Soubier v. Brown* (1919, Ind.) 123 N. E. 802. But in the case of ratification the ratifier lends credit directly to the first act, which he does not do in the case of a copy.

A had held authority originally to speak for P and it is a matter of comparatively unimportant detail whether or not P is bound as having made the first statement or as having given it added weight. The truth is that he should pay for all the damage caused and that is the result of the decisions. Something may be said even for the converse case where ratification releases A from liability. Take the case in Godbolt⁹⁴ where one purporting to be a bailiff for P distrained T's goods and P later ratified. As P had a privilege to distrain the goods, T held them subject to this privilege. His injury was not that the goods were taken but that they were taken without coming to the hands of P. When they did come to P's hands, the real grievance was gone. The common law did not show an entire lack of common sense in taking away a cause of action no longer needed for compensation or for the vindication of a right. It is the converse of trespass *ab initio*, also a case turning upon the existence of a privilege.

TERMINATION OF THE POWER

Agency. (a) By act of the parties. The power to create contractual relationships may have been created either by communication to the agent or by communication to the third party. In both cases it is created by an expression of the will of the principal. Since the power is held for the benefit of the principal and is subject to his control, it can continue no longer than the existence of his expression of willingness for its continuance. A contract with the agent is purely collateral to it, for the agent's duty is to give obedience. In this respect the power differs from that held by an offeree who has paid for the continuance of the offer, for such offeree owns the power for himself which is just what an agent does not. It is similar to a "mere" offer. It may die by lapse of time or destruction of the subject-matter. So also it can be revoked only by a communication. If created by a statement to A it continues until A has been notified; if by communication to T, it will not be revoked until T is notified. If the power was created by communication to both A and T, and A alone is notified of the revocation, he still possesses and can exercise the power, becoming a wrongdoer towards P. If T alone is notified, A may exercise the power rightfully, but whatever T may acquire by such exercise he will hold subject to the equitable rights of P.

I believe that this method of treating revocation is simpler and less artificial than is the estoppel route, by which we are obliged to say that the power is revoked by notice to the agent, but that the principal is estopped as to unknowing third persons. By the same reasoning, the power would terminate by an uncommunicated determination of the principal who, however, would be estopped until communication

⁹⁴ 109; pl, 129.

to the agent. In fact, it is notice, irrespective of the state of mind, which terminates the power.⁹⁵

(b) *By operation of law.* Where the principal dies, becomes bankrupt or insane, the overwhelming weight of authority is that the power terminates at once irrespective of notice to the agent or to third persons.⁹⁶ It seems reasonably obvious that the result is shockingly inequitable, including as it does the liability of an innocent agent, deprived of his power without his fault, to respond upon his warranty of authority to the third person.⁹⁷ It is not a necessary result for it is not in accord with the Roman or the Continental law.⁹⁸ As has been pointed out, it does not follow from the early authorities.⁹⁹ Story makes the distinction between the acts which must be done in the name of the principal and those which may be done in the name of the agent,¹⁰⁰ and if we are to treat form alone, this may be of some importance.

I believe that the whole difficulty has come from a rigid adherence to the *formula* of identity and that it is the inevitable consequence of considering the agent as the *alter ego* of the principal and existing only by his will. These cases furnish the strongest argument for those who say that agency has been based by the courts upon this merger of identities. By rationalizing the subject and treating the agent as a grantee of a power, all but the most formal difficulties dis-

⁹⁵ It may be that this notice does not necessarily include bringing home knowledge to the individual third person, but may be complete when such acts are done as would relieve a retiring partner from liability for partnership acts. The cases are inconclusive. See *Meuschke v. Riley* (1911) 159 Mo. App. 331, 140 S. W. 639; *Stevens v. Shroeder* (1899) 40 App. Div. 590, 58 N. Y. Supp. 52. The German Civil Code, after providing for the creation of the power by notice or declaration to the agent or third person, in sec. 167, provides (sec. 168) that "the provisions of sec. 167 applies *mutatis mutandis* to the declaration of revocation," unless (sec. 173) the third person ought to know of the termination. In sec. 176 it allows revocation by public notification.

⁹⁶ Mechem, *op. cit.*, sec. 664; 2 Kent, *op. cit.*, *645.

⁹⁷ *Yonge v. Toynbee* [1910] 1 K. B. 215.

⁹⁸ Wharton, *op. cit.*, sec. 101; Gaiuss, 3, 160; Inst. Just. 3, 26, 10. In the civil law, however, offers are not necessarily terminated by death. German Civil Code, secs. 130, 153. If there is an analogy between offers and powers of this sort, the civil-law rule will not be of much assistance here.

⁹⁹ Sutliff, J. in *Ish v. Crane* (1858) 8 Oh. St. 520; (1862) 13 Oh. St. 574. The question seems not to have been expressly raised. The statements of Coke and Littleton that a letter of attorney to deliver seisin would be void upon the death of the one giving the letter, had no reference to acts done later without knowledge. See Coke, *Institutes*, sec. 66. There is little doubt, however, that at law the lack of notice would have made no difference. In *Knowles v. Luce*, Moore, 109, it was held that the under-steward holding court in ignorance of the death of the steward, could grant copyhold, "acting with color." This case was mentioned with approval by Lord Ellenborough in *King v. Bedford Level* (1805) 6 East, 356.

¹⁰⁰ Story, *op. cit.*, sec. 495.

appear. We have to consider only whether, as a matter of good business, it is desirable that the agent should have the power to bind the estate. It is of course clear that no question of estoppel is involved. It is equally clear that there can be no power to cause a dead man to become a party to a contract or to transfer a title to a dead man's property, for of course he has none. If Chief Justice Marshall's statement is correct:

"The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing,"¹⁰¹

we are concluded, in the case of the principal's death, by the necessary answer to Lord Ellenborough's question: "How can a valid act be done in the name of a dead man."¹⁰² But this does not explain the rule that bankruptcy or insanity terminates the power without notice, for in those cases there is still a name attached to a living personality, if that is all that is necessary. And Lord Ellenborough should have considered more closely his own quotation from Hale, that

"though in consideration of law the commissions of the Judges, &c. immediately determined on such demise, yet their intermediate acts, between the demise of the crown and notice of it, were good. 2 *Hale's P. C.* 24. *Cro. Car.* 97."¹⁰³

There is nothing to prevent the law from creating a new power equal in extent to the old one, but affecting the estate of the deceased person, where it is equitable to do so. Assuming, however, that only a statute will be effective to turn the courts from their general theory, there is one case in which I believe the courts might make an exception. An agent has a right of exoneration where he is about to be injured in obeying orders without fault on his part. Admitting that the agent's power ceased with the death or insanity of the principal, there is no reason why the right of exoneration should cease. If, therefore, the agent acted innocently and under such conditions that the third person has a claim upon him, the estate should exonerate him. Through this right, the third person could reach the estate. The simplest method of achieving the result would be for the courts to do as they have done in countless other cases, eliminate the equitable steps and treat the power as continuing until the agent has been notified.¹⁰⁴ The equity of this result is especially clear in the case of the death of

¹⁰¹ *Hunt v. Rousmanier's Administrators* (1823, U. S.) 8 Wheat. 174, 204.

¹⁰² *Watson v. King* (1815, N. P.) 4 Camp. 272.

¹⁰³ *King v. Bedford Level*, *supra*.

¹⁰⁴ This is now English law under the Conveyancing and Law of Property Act, 1881, sec. 47, where money has been paid to an agent in ignorance of the death of the principal.

a solvent principal, where volunteers are opposed to the agent. It is said that death is more or less public. Admitting this, the representatives of the deceased are in a much better position to notify both the agent and third parties than are the latter to acquire knowledge. Failing in this, they are in no position to complain of the results of a transaction set in motion by the testator and brought to consummation without fault.

Non-agency. In every case where the power holder has bought the power for himself or for another, there can be no question of agency. As the owner of the power he can deal with it as he pleases, ignoring the will of the creator of the power. Although called powers of attorney, they are not powers exercised by an agent. Such powers are therefore irrevocable. If they terminate upon the death, bankruptcy or insanity of the creator of the power, it must be because of some limitation inherent in such powers. A discussion of this will be postponed to a later paper.